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No. 99-1850

In The Supreme Court of the United States

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA, MANOHAR B. KADAM, CAROLYN HOLDER,
***pro se*, on behalf of themselves and class of similarly situated persons,**

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

Preface

An employer implemented a voluntary early retirement incentive plan (hereafter "VEREP"). Before the eligibility periods expired the positions of some of the individuals eligible for VEREP were eliminated. Petitioners and prospective class members compose that class of individuals. This class was given no option to remain employed. All remaining individuals had the option of remaining in their positions or retiring under that plan. The employer also eliminated the positions of *others*, not eligible for VEREP, these individuals qualified for severance benefits. Petitioners and prospective class members who qualified for VEREP also qualified for these same severance benefits. Petitioners and the prospective class were denied or required to chose between VEREP and their severance benefits. All petitioners and prospective class members are in the age-protected class; all have pension eligibility status.

This petition presents five questions to the Supreme Court, which collectively, constitutes an issue of first impression.

Question 1

Does ADEA, as amended by OWBPA, provide the controlling statutes for ERISA and all other employee benefit plans where benefits are applicable to age-protected individuals?

Question 2

Does implementing a voluntary early retirement incentive plan which does not provide age protected individuals an option of remaining employed, compel their retirement or otherwise violate 29 U.S.C. §621 *et seq*. If so, what is the remedy?

Question 3

Where individuals in the age-protected class have qualified for severance benefits on the same terms and conditions as other workers, does the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, prohibit the reduction or denial of severance to those individuals except as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A)? If so, were the conditions set forth in any of these statutes satisfied by the defendants when implementing their VEREP and Severance plan(s)?

Question 4

Should the Court so find in Question 3 *supra*, the answers "yes" and "no" respectively, does an ERISA plan administrator or an employer violate 29 U.S.C. §621 *et seq.*, by action contrary to these controlling statutes where the ERISA severance benefit is applicable to age protected individuals? If so, does a Federal Court, in such circumstance, have discretion to deny the certification of an ERISA class when all other conditions for certification are met?

Question 5

Does the standard for liquidated damages, established as *stare decisis* by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, (1985) apply in this case as a matter of law?

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[1/] The purpose of this brief is to bring to this Court's attention the recent decision in Erie County Retirees Ass'n et al v. County of Erie et al, 220 F.3d 193 (3d Cir. 2000). The other cases listed above are cited and/or discussed in that decision.

I
INTRODUCTION

The 3rd Circuit Court of Appeals recently found the ADEA, as amended by OWBPA, applicable where an employer offers its Medicare-eligible retirees health insurance coverage allegedly inferior to the coverage it offers to other retirees who are not eligible for Medicare. Erie County Retirees Ass'n et al v. County of Erie et al, 220 F.3d 193 (3d Cir. 2000), ("Erie").

Erie was decided on August 1, 2000, Petitioners' last date of filing in this Court was July 6, 2000.

Held: The ADEA, as amended by OWBPA, applies when an employer offers its Medicare eligible retirees health insurance coverage inferior to the coverage offered to other retired employees not eligible for Medicare. Id. at 217.
Held: Medicare eligibility, a factor analytically indistinct from age, is a direct proxy for age. Id. at 211.
Held: Employer's policy based on a factor analytically indistinct from age, discriminates on its face. Id. at 210-212
Held: Where employer's policy discriminates on its face, the motivating factor is immaterial in determining adverse treatment. Id. at 212-313.
Held: Employer's "reasonable factors other than age" defense inapplicable where the employer engages in explicit age-based discrimination. Id. at 214-215.

Petitioners contend the implication of Erie, is: where an employer's policy is based on a factor analytically indistinct from age, the policy is discriminatory on its face and the employer discriminates "because of.....age; ". 29 U.S.C. §623 (a) (1) & (2). See Id. at 210-212. Petitioners contend further, where an employer's policy provides lower employee benefits to age-protected individuals, based on a factor analytically indistinct from age, the conduct violates the ADEA, as amended by OWBPA, unless one of ADEA's "safe harbors" is applicable. Id. at 215.

Respondents in Hawes, as did the employer in Erie, argued that there is no *prima facie* showing of age-adverse treatment. Each relied heavily on Hazen Paper Co. et al., v. Biggins, 507 U.S. 604, 113 S. Ct. 1701, ("Hazen Paper"). The Supreme Court emphasized in that case the ADEA is not violated when an employer's decision is wholly motivated by factors other than age. Id. at 611. Erie at 211. However, the Court in Hazen Paper left open specific questions i.e.: ".....an employer who targets **employees with a particular pension status** ....." Id. at 611. Erie at 211. "..dual liability under ERISA and ADEA where the decision was motivated by both the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, ..." Id. at 613. Erie at 211. (Emphasis added.) Petitioners submit that all of the questions left open in Hazen Paper are applicable to petitioners and prospective class in this case. *The day to examine the "special case" and issues left open in Hazen Paper has arrived.* See Section III, pages 3-4 *infra*; Petition at 34-36.

II
THE EFFECT OF ERIE ON THIS CASE

In Erie, the employees' sole argument was that the safe harbor set forth in ADEA 29 U.S.C. § 623(f)(2)(B)(i) is the only available defense. Erie at 211, 213-214. That "safe harbor" incorporates, as a matter of law; 1) the equal benefit-equal cost principle, and 2) the mandate that the employer is to bear the burden to plead and prove the defenses and exceptions established in that section, i.e. the employer's affirmative defense. Erie at 198-199 & footnote 3. See Burden of Proof at Apps.145-146. See Petition at 21. See Petitioners' Reply Brief at 2-4, hereafter "Prb."

The Third Circuit first considered the background circumstances of the OWBPA which lead to its passage beginning with the Supreme Court's decision in Ohio Public Employees Retirement Sys. v. Betts, 492 U.S. 158 ("Betts").

See Erie at 202-206. The Erie Court then noted: "While the legislative history may provide assistance in resolving ambiguity, the language of the statute must guide us in the first instance." Erie at 208.

The Court in Erie found the employees' threshold showing of "allegedly inferior" coverage sufficient to require the employer's affirmative defense in accordance with the statute. In so finding, the Court properly placed the burden of proof on the employer to plead and prove the "allegedly inferior" coverage was within the standard as prescribed in section 623 (f)(2)(B)(i). Erie at 208-210, 213.

The threshold showing in Hawes, as in Erie, mandates respondents to plead and prove an affirmative defense under any one of the safe harbors established by OWBPA. Respondents are affirmatively required to prove the reason for denial of severance benefits does not discriminate on the basis of age. Where an employer cannot meet the burden of proof, the employer discriminates "because of .... age;".

Petitioners reiterate, in Hawes, as in Erie, the only defense available to respondents is one of the affirmative defenses provided by OWBPA's "safe harbors". That affirmative defense necessarily applies to petitioners' prospective class as well. See Petition at 20-22, 24, Prb. at 2-4. See also Erie at 198: "On February 10, 1999, the [district] court certified the action as an opt-in class action." Erie at 198.

III

MEDICARE AND PENSION ELIGIBILITY ARE BOTH DISTINGUISHABLE AS A "SPECIAL CASE" IDENTIFIED IN HAZEN PAPER; EACH IS DISCRIMINATORY ON ITS FACE

The Erie Court found Medicare eligibility to be a protected trait and therefore distinguishable from Hazen Paper, *supra.* The Court recognized the protected trait as the "special case'" question left opened by the Supreme Court in Hazen Paper. The Third Circuit stated:

> We find Hazen Paper to be distinguishable. Medicare eligibility does not merely "correlate[ ] with age," see id. at 608, 113 S.Ct. at 1705, as does years of service. Rather, as the district court here pointed out, Medicare eligibility "follow[s] ineluctably upon attaining age 65." Erie County, 91 F.Suppl.2d at 867. ***** Thus, Medicare status is a direct proxy for age. This case is therefore parallel to the "special case" mentioned by the Court in Hazen Paper, where an adverse action is taken against a person because of a particular event (i.e. approaching pension vesting) and that event in turn occurs because the person has attained a certain age. See DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 730 n.12 (3d Cir. 1995) (implying that the ADEA is violated "when a company's policy distinguishes employees on the basis of a factor analytically indistinct from age").

Erie at 211 (emphasis added)

The Erie Court cited the identical legislative history of OWBPA as did petitioners (Petition at 18, 21), namely:

> During debates on the OWBPA, Representative Clay indicated that Medicare status is a proxy for age. See 136 Cong. Rec. H8617 (daily ed. Oct. 2, 1990) (statement of Rep. Clay) ("[E]mployers must be prohibited from providing older workers smaller benefits or no benefits solely because of their age or other proxies for age for example, pension or Medicare eligibility."); see also S. Rep. No. 101-263, at 23 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1528 (indicating that, where "[p]ension-eligibility is a proxy for age . .. it is per se age discrimination to use pension-eligibility as a basis for denying an older worker any other benefit.")

Erie at 211, footnote 10 (emphasis added)

The Third Circuit in Erie examined and cited Johnson v. New York, 29 F.3d 75 (2d Cir. 1995). In that case, a mandatory condition of employment required plaintiff to

maintain "dual status" in the Air National Guard ("ANG"), while employed as a security guard at the air base. When plaintiff turned 60 he was force to resign from the ANG and according he was fired as a security guard. The Third Circuit cited Johnson: "[The] consequent mandatory requirement at 60 ..... is not merely correlated with age; unlike Hazen Paper, the employer's decision here in fact implements an age-based criterion. .....age and termination are inextricably linked. The sole reason for plaintiff's termination was age." "Id. at 79-80 (citation and internal quotation marks are omitted." Erie at 211-212.

The Third Circuit then applied the analysis in Johnson to Erie and held: " Similarly, in our case, [the employer] 'implement[ed] an age-based criterion' by placing Medicare-eligible retirees in the [inferior coverage]." Erie at 212.
See also footnote 12 at id. 212.

The Third Circuit, in citing its previous decision in DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 726 (3d Cir. 1995), at footnote 9, acknowledged the employees' facially discriminatory theory in Erie:

> Appellants' theory is that the [employer] has adopted a facially discriminatory policy with respect to retiree health coverage. We have commented as follows regarding facially discriminatory policies:
>
> > We agree that when a policy facially discriminates on the basis of the protected trait, in certain circumstances it may constitute per se or explicit age discrimination. And, whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. This is because, in a facial disparate treatment case, the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis. Thus, when the policy itself displays the unlawful

> categorization, the employee is relieved from independently proving intent.
>
> DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 726 (3d Cir. 1995) (citations and internal quotation marks omitted).

Erie at 211 (emphasis added)

The uncontested record in Hawes establishes that only VEREP *eliminated* individuals,[2/] were denied or were required to choose between "voluntary" retirement and the severance they qualified for as a result of their terminations. See "Hobson's Choice", Petition at 6-8, 35. Respondents' severance policy distinguished petitioners and the prospective class on the basis of pension eligibility; therefore respondents' severance policy is age discriminatory on its face. In Hawes, pension eligibility, like Medicare eligibility, a factor analytically indistinct from age, is the basis for the denial of severance benefits, hence petitioners and the prospective class established a *prima facie* case based on age.

The Erie Court then held the motivating factor in a facially discriminatory policy to be of no consequence when determining adverse treatment, stating:

> The fact that there is no reason to believe that the [employer] possessed a malevolent motive or acted on the basis of hostile age-based stereotypes is irrelevant. The Supreme Court has indicated that a policy explicitly based on a prohibited factor such as sex or age -- is illegal regardless of the underlying motive:
>
> > [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect..... The beneficence of

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[2/] VEREP's pension eligible employees who were eliminated with no option of remaining employed as compared to VEREP pension eligible individuals who had the option of remaining employed. Petition at 7.

> an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination.....

Erie at 212, quoting from International Union v. Johnson Controls, Inc. , 499 U.S. 187, 199-200, 111 S.Ct.1196, 1203-04 (1991).

The Third Circuit found unequivocally that the employees had established a claim of age discrimination under 29 U.S.C. § 623(a)(1). The Court stated:

> The first step in our analysis is to determine whether plaintiffs have established a claim of age discrimination under section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1). That provision makes it unlawful for an "employer" to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." .....The latter phrase is explicitly defined in the ADEA, as amended by the OWBPA, to include "all employee benefits." See 29 U.S.C. § 630(*l*). ... We believe that the ordinary meaning of the term "employee benefit[s]" should be understood to encompass health coverage and other benefits which a retired person receives from his or her former employer.

Erie at 208-209 (emphasis added)

The Third Circuit then concluded this analysis stating:

> In sum, we conclude that the [employer] has treated [these employees] differently than other retirees with respect to their "compensation, terms, conditions, or privileges of employment, because of . . . age." Accordingly, appellants have established a claim of age discrimination under 29 U.S.C. § 623(a)(1), unless any of the ADEA's "safe harbors" is applicable.

Erie at 213 (emphasis added)

Erie clearly establishes that where an employer's policy provides lower benefits to age-protected individuals, based on a factor analytically indistinct from age, that employer violates the ADEA, as amended by OWBPA, unless any of the ADEA's "safe harbors" is applicable.

IV
THE ERIE COURT HELD INAPPLICABLE THE EMPLOYER'S "REASONABLE FACTORS OTHER THAN AGE" DEFENSE

The employer in Erie argued it was entitled to the "reasonable factors other than age" defense set forth in 29 U.S.C. § 623 (f) (1). The Third Circuit rejected this argument, stating:

> We are not persuaded that the "reasonable factors other than age" defense is applicable. While it is possible that Congress intended Medicare eligibility to be a "reasonable factor other than age," we believe it is more likely that Congress would have drafted a specific provision addressing the issue rather than to rely on the courts to make a particular interpretation of the term "reasonable factors other than age." In reaching this conclusion, we point out that the legislative history we have cited demonstrates that when Congress passed the OWBPA it expressly considered the issue of availability of Medicare coverage. In addition, we note that the "reasonable factors other than age" defense has been held inapplicable to a policy which explicitly discriminates based on age. See EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1541 (2d Cir. 1996) ("[A]n employer has a defense if his policy is based on reasonable factors 'other than age,' not if the policy is reasonably based on age. By its terms, the statute supplies an exception for 'age-neutral' decisions based on other factors such as health or even education that might be correlated with age, not an exception for policies that explicitly but reasonably discriminate based on age.") (citation omitted). Here, the [employer] has engaged in

explicit age-based discrimination by using a proxy for age-Medicare eligibility--as a basis for differential treatment. Erie at 214-215 (emphasis added)

When Congress passed the OWBPA, akin to Medicare benefits in Erie, it specifically considered severance benefits. In so doing, Congress expressly made available precise exceptions and statutorily controlled severance benefit reductions. An employer may not use any other method to deny or reduce these benefits to avoid its liability. Accordingly, as in Erie *supra,* the "reasonable factors other than age" defense is equally inapplicable in Hawes. As also recognized in Erie, an employer engages in explicit age-based discrimination by using Medicare eligibility, a direct proxy for age, as a basis in denying benefits. In Hawes, as in Erie, respondents have engaged in explicit age-based discrimination using pension eligibility, a direct proxy for age, to deny severance benefits.

V

THE FINDINGS IN ERIE CORROBORATE PETITIONERS' CONTENTION THAT ADEA, AS AMENDED BY OWBPA IS CONTROLLING WHERE BENEFITS ARE APPLIED TO AGE PROTECTED INDIVIDUALS

The Erie Court acknowledged that the employees had correctly interpreted the statute, to writ:

> Appellants contend that the only possibly applicable safe harbor under the ADEA is that set forth in 29 U.S.C. § 623 (f)(2)(B)(i), which adopts the equal benefit or equal cost principle. Appellants argue that the [employer] cannot satisfy that principle because it is providing lesser benefits to retirees age 65 and over as compared to younger retirees while simultaneously incurring lesser costs on the older retirees' behalf. The [employer] argues that it is entitled to the benefit of the "reasonable factors other than age" defense set forth in 29 U.S.C. § 623 (f) (1). The district

court merely held that "the ADEA clearly was not intended to apply to retirees," Erie County, 91 F. Supp.2d at 880. Thus, the district court's view is that employers may treat .....retirees differently.....without meeting the equal benefit or equal cost standard. Effectively, then, the district court recognized a safe harbor in addition to any explicitly set forth in the ADEA or the OWBPA.

Erie at 213-214 (emphasis added)

We cannot, however, accept the district court's approach for the straightforward reason that it is not reflected in the actual language of the ADEA or the OWBPA. Congress knew how to craft exceptions to the ADEA, as there are several explicitly worded safe harbors in 29 U.S.C. § 623. Yet, aside from section 623(f)(2)(B)(i), there is no provision in the ADEA permitting an employer to treat retirees differently with respect to health benefits based on Medicare eligibility.

*****

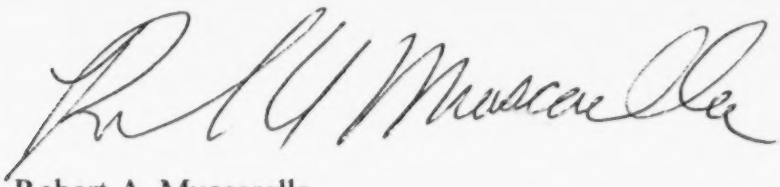
We believe that the appellants have put forth the proper interpretation of the statute, and thus we hold that the safe harbor set forth in 29 U.S.C. § 623(f)(2)(B)(i) is applicable in this case if the [employer] can come within it. The plain language of section 623(f)(2)(B)(i) supports this conclusion by expressly adopting the statement of the equal benefit or equal cost principle as set out in 29 C.F.R. § 1625.10 (1989).

Erie at 214-215 (emphasis added).

CONCLUSION

Petitioners respectively submit the Erie decision supports a grant of *certiorari* in their case. The Third Circuit decisions in Erie and in petitioners' case are irreconcilable. It is therefore, up to this Court to resolve this compelling issue once and for all, in conformity with the controlling statutes.

Respectfully submitted by each named petitioner *pro se* ,



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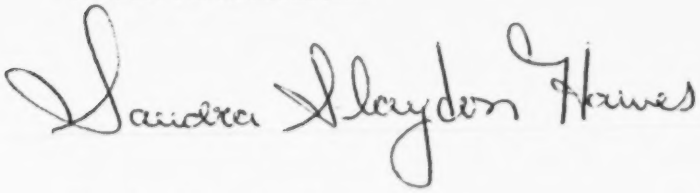

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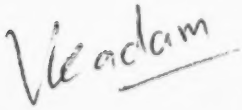

Vanita Kadam, the estate of Manohar B. Kadam

Dated: SEP 11 2009